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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 73-1501

FRED BRAMBLETT,
Petitioner,

v.

WILLIAM R. DESOBRY, et al.

PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals for the Sixth Circuit

The petitioner, Fred Bramblett, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in this proceeding on January 8, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, as yet unreported, appears at Appendix A, pp. A-1-A-3, *infra*.

The opinion of the United States District Court for the Western District of Kentucky, as yet unreported, appears as Appendix B, pp. A-4-A-7, *infra*.

The action of respondent General Desobry in discharging petitioner from his employment, not reported, appears as Appendix C, pp. A-8-A-11, *infra*.

The conclusion of the report of the Appeals Examiner, recommending that petitioner be retained in employment, not reported, appears as Appendix D, pp. A-12-A-13, *infra*.

JURISDICTION

The judgment of the Court of Appeals (Appendix A, pp. A-1-A-3, *infra*) was entered on January 8, 1974. This petition for certiorari was filed less than 90 days from the date aforesaid.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether sovereign immunity applies to a suit for judicial review of administrative action.

2. Whether the Administrative Procedure Act constitutes a waiver of sovereign immunity.

3. The proper basis on which to decide whether a government officer's act is privileged.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law;"

The judicial review sections of the Administrative Procedure Act are set forth in 5 U.S.C. §§ 701-706. These are set forth in Appendix F for general reference. In particular, § 702 (designated as § 10(a) in the original statute) provides:

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

Statutes relating to jurisdiction of Federal District Courts are set forth in Appendix F.

STATEMENT OF THE CASE

Petitioner was a federal employee. Respondent, General Desobry, discharged him from his job without proper grounds and using improper procedure. Petitioner sought review of this administrative action in the courts, in accordance with the accepted practice of the federal judiciary. The Federal District Court erroneously held that the doctrine of sovereign immunity barred the suit and granted summary judgment without considering the merits of the case.

The events took place as follows. Petitioner was the manager of the Fort Knox Rod and Gun Club, a nonappropriated-fund-activity of the Federal Government. Respondent General Desobry was the commanding general of Fort Knox. General Desobry suspended petitioner, alleging mismanagement of the Club. Under applicable administrative regulations, petitioner brought the matter before an appeals examiner. After a hearing the examiner rejected the charges and found in petitioner's favor, recommending his reinstatement. (Appendix D) Respondent Desobry refused to follow the examiner's decision and instead appointed a new *ad hoc* committee of officers to re-

port on the matter. Whereas the appeals examiner had afforded petitioner the opportunity to present evidence and defend himself, this later committee did not grant petitioner any aspect of due process. Petitioner was not even advised of its existence. Subsequently, with no explanation other than apparent reliance on the conclusions of this secretive body, General Desobry discharged petitioner from his employment.

Petitioner instituted suit against General Desobry and the Secretary of the Army in the United States District Court for the Western District of Kentucky. The suit originally sought information under the Freedom of Information Act regarding the findings of the appeals examiner and the *ad hoc* committee, which respondent had withheld from petitioner. The report of the appeals examiner exonerating petitioner was made available before an answer was filed. (No document regarding the *ad hoc* board was revealed at any time.) Petitioner then amended his complaint to seek declaratory and injunctive relief in accordance with the long recognized concept of "nonstatutory" review of administrative action.

The complaint alleged that both the substance and procedure of General Desobry's actions were in violation of the Due Process Clause, statutes, and administrative regulations. A claim was also made against General Desobry for damages resulting from his unauthorized act. Despite the demonstration of numerous issues of law and fact by petitioner, the District Court halted the action at the threshold, holding that it constituted a suit against the federal government and that sovereign immunity was therefore a bar. The claim against General Desobry was also dismissed, apparently on the basis of governmental officer privilege. On appeal to the Sixth Circuit Court of Appeals, the District Court decision was affirmed, *per curiam*, without discussion of the significant issues of the case.

Facts: Very few facts underlie the Court's decision. The Fort Knox Rod and Gun Club was held to be an instrumental-

ity of the United States. General Desobry filed an affidavit mainly devoted to interpretation of the law, with hardly any factual explanation of his actions (see Appendix E). No discovery was conducted. Respondent Desobry made a determined effort to withhold significant evidence in the case from petitioner. No stipulations were made. No hearing was held by the District Court on the motion for summary judgment. The decision to bar petitioners suit was apparently based entirely on the General's title and the finding that the Rod and Gun Club was an instrumentality of the United States.

Briefly stated, petitioner's efforts to obtain judicial review of an administrative action were blocked at the threshold by the District Court's application of the doctrine of sovereign immunity. The merits of the case were not considered or decided and consequently the merits are not the subject of this petition. The only issues are sovereign immunity and government officer privilege. Petitioner has been denied his day in court, without justification in law or policy.

REASONS FOR GRANTING THE WRIT

1. There Are Many Conflicts Regarding Sovereign Immunity and Its Relation to Nonstatutory Review.

Sovereign immunity is in a state of conflict in and among the circuits, and in conflict with the decisions of this Court, departing from the mainstream of precedent, resulting in arbitrary decisions and injustice.

A. The uncertain foundation of sovereign immunity and the development of nonstatutory review to escape its inequitable effects.

The doctrine of sovereign immunity is a judicially created doctrine without constitutional or statutory basis. As noted an authority as Dean Prosser has characterized it as feudal and monarchistic. W. Prosser, *Law of Torts* 971 (4th Ed. 1971). Professor Davis says of the doctrine, "One can read a hundred judicial opinions about sovereign immunity without ever encountering a reason in favor of it. Decisions based on sovereign immunity customarily rest on authority, the authority rests on history, and the history rests on medievalisms about monarchs." K. Davis, *Administrative Law Text*, § 27.02, at 497 (3rd Ed. 1972).

The courts which created this doctrine saw that it would cause injustice, in conflict with the principle that the government is not to be above the law. A solution was afforded by permitting suit to be maintained against a government officer, as distinguished from a suit against the government itself. Ex Parte Young, 209 U.S. 123 (1908); Philadelphia Co. v. Stimson, 223 U.S. 605 (1912); American School of Magnetic Healing v. McAnnulty, 187 U.S. 94 (1902). These decisions firmly established the rule that where a government official acted be-

yond the scope of his authority an injured individual could obtain injunctive relief, naming the officer as the defendant.

This procedure became known by a slightly inaccurate label, "nonstatutory review", meaning that the action was not based on a special statutory grant of federal jurisdiction relating to the particular officer, but rather on the general jurisdictional statutes, 28 U.S.C. § 1331, and more recently the Federal Mandamus Act, 28 U.S.C. § 1346 and the Federal Declaratory Judgment Statutes, 28 U.S.C. §§ 2201, 2202. (Appendix F) Countless aggrieved parties have obtained redress in suits based on nonstatutory review. Davis, *Administrative Law Text*, § 27.03 at 499 (3rd Ed. 1972) This procedure is recognized in Rule 25(d) of the Federal Rules of Civil Procedure. (Appendix F) It was thus with justifiable reliance on this established doctrine that petitioner sought judicial review in the instant case.

Nonstatutory review seeks an injunction to force the government officer to correctly perform his duties. All the real interests of the sovereign therefore support the citizen in his action. Land v. Dollar, 330 U.S. 731, 738 (1947). Nonstatutory review does not constitute a suit against the government itself, nor does it seek damages from the government. Properly understood, sovereign immunity is irrelevant to suits for nonstatutory review. It was erroneous to apply sovereign immunity in the present suit, since nonstatutory review was sought.

B. The unfortunate results of the Larson decision.

By the development of nonstatutory review, the courts afforded judicial review of unauthorized administrative action and substantially ameliorated the unjust effects of sovereign immunity. Davis, *Administrative Law Text*, § 27.03 (3rd Ed. 1972). Then in 1949 a decision was handed down which produced uncertainty and conflict in this area of the law. Larson

v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949). This case concerned alleged violation of a war contract at the instigation of a government official. The court held that suit against the officer was barred. The opinion in the case (1) implied that there was an outer circle of conduct which, although not authorized, might nevertheless be regarded as action of the sovereign, and (2) imported into nonstatutory review the notion that the suit was barred if the act of the officer was such that it would be imputed to the government under "the normal rules of agency."

The *Larson* opinion introduced confusion into the long line of precedent stemming from *Ex Parte Young* and *Philadelphia Co. v. Stimson, supra.* Highly unfortunate was the introduction of the law of agency into this area, where it is not merely irrelevant, but pernicious. Agency *extends* liability, in order to reach the deep pocket and insure redress. Sovereign immunity *restricts* liability, prevents redress and creates a substantial danger of injustice. Even worse, as in the present case, the *Larson* decision tends to encourage dismissal in some cases on the basis of the officer's title, without real examination of the nature of the suit. See Jaffe *Judicial Control of Administrative Action* 226-231 (1965); and Malone v. Bowdoin, 369 U.S. 643 (1962). In the present case, the lower courts made no apparent effort to deal with or justify the confusing *Larson* concepts, but merely cited *Larson* as authority for summary judgment and quit.

Following *Larson* sovereign immunity was discussed in another Supreme Court opinion, *Hawaii v. Gordon*, 373 U.S. 57 (1963). This *per curiam* opinion was too abbreviated to accomplish any clarification of the law in this area, and instead only succeeded in introducing another unfortunate phrase, applying sovereign immunity if the relief requested "would operate against the United States." 373 U.S. 57 at 57. Clearly this phrase is too broad and does not accurately re-

flect the practice of the courts, before or after the *Hawaii v. Gordon* decision.

The leading commentators have pointed out that the phrases in these cases are inaccurate formulations. An extensive study was made by Professor Roger C. Cramton (now Dean at Cornell Law School) as consultant for the Administrative Conference of the United States. In a comprehensive article published in the *Michigan Law Review*, he analyzed and pointed out the fundamental defects in the *Larson* and *Hawaii* decisions. Cramton, *Nonstatutory Review of Federal Administrative Action: The Need for Statutory Reform of Sovereign Immunity, Subject Matter Jurisdiction, and Parties Defendant*, 68 Mich. L. Rev. 389 (1970). With regard to *Hawaii v. Gordon*, Professor Cramton stated:

> "Mandatory relief has been granted against federal officers for many years under such circumstances, and *Hawaii v. Gordon* muddies the waters by suggesting that affirmative relief is always barred by sovereign immunity." 68 Mich. L. Rev. at 415.

With respect to the *Hawaii* case, the article also quotes 3 Davis, *Administrative Law Treatise*, § 2701 at 149 (Supp. 1965):

> "This so-called general rule has never been the general rule and is not likely to become the general rule. Judgments of courts have often expended themselves on the public treasury or domain have often interfered with the public administration, and have often restrained the government from acting or compelled it to act, and judgments of courts will surely continue to do these things in the future." 68 Mich. L. Rev. at 417.

The net effect has been to confuse an area of law that need not be in doubt. The principles of nonstatutory review were developed to make judicial review available without interference

from the doctrine of sovereign immunity. Accordingly, although sovereign immunity may properly apply to some cases (such as damage suits against the government itself), it does not bar suits for nonstatutory review.

The confusing statements in the *Larson* and *Hawaii* cases are frequently merely ignored by the courts, and countless cases of nonstatutory review are decided without mention of sovereign immunity. *See*, for example, Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). But because *Larson* and *Hawaii* speak too broadly, the immunity doctrine has become a "wild card" that can be applied arbitrarily to shield unauthorized conduct. This happened to the petitioner, and it is a violation of his due process rights.

C. **There is conflict in and among the circuits concerning Sovereign Immunity and Nonstatutory Review.**

The practical result of the *Larson* decision has been arbitrary action and inconsistency. The courts, confronted on the one hand with *Larson's* unclear conception of immunity, and on the other hand the strong tradition of reviewability embodied in the countless cases allowing judicial review, have subsided into conflicting decisions based on unstated or obscure reasoning. It is true, a few suits for nonstatutory review have been dismissed with a simple reference to *Larson*, as for example, Doehla Greeting Cards v. Summerfield, 227 F.2d 44 (D.C. Cir. 1955). Other cases have distinguished or modified *Larson's* holding, as illustrated by two cases from the same circuit, *West Coast Exploration Co. v. McKay*, 213 F.2d 582 (D.C. Cir. 1954); and *Manhattan-Bronx Postal Union v. Gronouski*, 350 F.2d 451 (D.C. Cir. 1965). In the former case *Larson* was restricted to cases where the plaintiff had failed to allege that the officer in question acted outside his authority, and in the latter *Hawaii* was *superimposed* on *Larson* to make

major determinant the nature of the relief requested. On the other hand *Larson* has been cited as authority to justify nonstatutory review and defeat sovereign immunity! Abbott Laboratories v. Gardner, 228 F.Supp. 855 (D. Del. 1964), affirmed without reference to sovereign immunity, 387 U.S. 136 (1967).

In three other decisions at the Circuit Court level, nonstatutory suits were entertained on the basis of *Philadelphia Co. v. Stimson* without any concern with the possible conflicting effects of *Larson*. Penagaricano v. Allen Corp., 267 F.2d 550 (1st Cir. 1959); Pan American Petroleum Corp. v. Pierson, 284 F. 2d 649 (10th Cir. 1960); Toilet Goods Association v. Gardner, 360 F.2d 677 (2nd Cir. 1966) *affirmed as companion case to Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). These are only an illustrative sampling of cases similarly decided.

A recent decision in the Fourth Circuit, *Littell v. Morton*, 445 F.2d 1207 (4th Cir. 1971), clearly demonstrates the conflicting nature of present authority concerning nonstatutory review and sovereign immunity. In that case, although the court found a *Larson-type* situation, it noted that sovereign immunity was a doctrine in great disfavor with commentators and courts, and recognizing the confused state of the law, it refused to give authority to *Larson*. The court said, "Against a weakening of general faith in the validity of the doctrine, we are persuaded that the justifications for the doctrine are not compelling here." (445 F.2d at 1214) This decision alone would seem to demonstrate a serious conflict in the Circuits. The court also said in *Littell v. Morton:*

> "It must be recognized at the outset that an effort to establish legal consistency in the decisions dealing with sovereign immunity is bound to be frustrating. The authorities are not reconcilable, and there are conceptual conflicts in the various holdings with which an intermediate appellate court must grapple." (445 F.2d at 1211-1212)

In another post-*Larson* decision concerning sovereign immunity and nonstatutory review, it was stated:

> "We shall not attempt to support this conclusion by undertaking to distill from the cases a verbal formula or rule designed for general application. Even a cursory examination of the authorities shows the futility of venturing in that direction." Penagaricano v. Allen Corp., 267 F.2d 550 at 554 (1st Cir. 1959).

Now, more than twenty years after the *Larson* decision, the circuits must still grope for guidance concerning sovereign immunity and nonstatutory review. Clarification is sorely needed.

D. Application of sovereign immunity to bar nonstatutory review is in conflict with decisions of this Court.

Where sovereign immunity is applied to a suit for nonstatutory judicial review of administrative action, it is in direct conflict with this Court's clear pronouncement in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), where the presumption of judicial review was expressly declared. It was further stated in *Abbott* that ". . . a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." 387 U.S. at 140. In *Harmon v. Brucker*, 355 U.S. 579 (1958), this Court held that a suit against the Secretary of the Army was cognizable where the Secretary had wrongfully issued dishonorable discharges. The Court there said: "Generally, judicial relief is available to one who has been injured by an act of a government official which is in excess of his express and implied powers." (355 U.S. at 581, 582)

And in the case of *Vitarelli v. Seaton*, 359 U.S. 535 (1959), this Court allowed a suit against the Secretary of the Army for

reinstatement with back pay of a wrongfully discharged federal employee. The *Vitarelli* decision is almost precisely on all fours with the facts of the instant case, and in that case nonstatutory review was allowed as a matter of course.

The *Vitarelli* decision, and the other pronouncements of this Court clearly establish the availability of judicial review of administrative actions. The District Court should have followed these precedents and sovereign immunity should not have been applied. Instead, in the present case, the lower courts held contrary to these precedents without recognizing or facing them.

E. Application of sovereign immunity as a bar to nonstatutory review is a violation of the due process clause of the Fifth Amendment.

In the present conflicting situation, many cases are heard under the doctrine of nonstatutory review without mention of *Larson* or sovereign immunity (*e.g. Vitarelli v. Seaton* and *Abbott Laboratories v. Gardner*, discussed *supra*), and others are dismissed under the holding of *Larson* with scarce recognition of the presumption in favor of review (*e.g. Malone v. Bowdoin*, 369 U.S. 643 (1962)). There is no consistency, no rational formulation of law governing the decision whether sovereign immunity should apply; application is arbitrary and unreasoned. The effect of this judicially created doctrine is therefore to deprive petitioner and similar parties of their rights to *substantive* due process, to be free from arbitrary destruction of their personal and property rights at the hands of government. *See* Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123 (1951).

The application of sovereign immunity also operates to deprive parties of their rights to *procedural* due process. As in the instant case, individuals may have personal and property rights infringed without receiving the essential due process require-

ment of a hearing. Their day in court may be precluded at the threshold. The correction of such unjust treatment has been of paramount importance to this Court in recent decisions, see for example, Goldberg v. Kelly, 397 U.S. 254 (1970).

The deprivation of both substantive and procedural due process rights which now result from the application of sovereign immunity to cases of nonstatutory review, brings constitional imperative to the need for clarification and correction.

F. A reasoned statement of law is needed to prevent the unjust "wild card" application of sovereign immunity to nonstatutory review.

If in some cases there is reason to deny judicial review, a rational decision can be made by the courts without sovereign immunity. The doctrine of non-justiciability is available if the facts for good reason warrant an exercise of judicial self-restraint. The cases regarding political questions, the abstention doctrine, and primary jurisdiction, illustrate the historic practices. Under Due Process concepts, the interests that are involved should be weighed to determine whether the case ought to be heard. Goldberg v. Kelly, 397 U.S. 254 (1970). Sovereign immunity adds nothing useful, but instead, if applied as it was in the present case, prevents inquiry into facts and frustrates reasoned decision, closing the courthouse door without basing the decision on fact or policy.

The issue presented here concerns sovereign immunity only in suits for nonstatutory review, *i. e.*, declaratory and injunctive relief against unauthorized acts of a government official. The United States is not the defendant. No claim is made for damages against the United States. Correction of unauthorized action is the goal. In this type of suit, sovereign immunity has no place. It is an unreasoned doctrine that excludes the courts

from performing the necessary and proper function of reviewing administrative action. If review is to be barred, the decision should be grounded on a determination of facts and policy. Petitioner believes that the Fort Knox Rod and Gun Club does not involve the kind of important government interests that would outweigh his request for judicial consideration. The District Court should at least have allowed an inquiry and considered the interests that would be affected.

The real concern is whether there are valid reasons for denying judicial review, and this requires an inquiry into the interests of government that are involved. This was recognized in *Littell v. Morton*, 445 F.2d 1207 (4th Cir. 1971), where sovereign immunity was abandoned in favor of a reasoned decision on the facts to decide whether suit should be entertained.

This approach would not require a repudiation of all cases where suit was barred in the past. A consideration of the facts and interests might well haev shown in the *Larson* and *Hawaii* cases that important government interests outweighed the interests of the plaintiffs. The needed advance in the law is to base decisions on reasoning and facts, not on a blindfolded, unreasoned bar at the threshold, not on vague language which is often ignored or unpredictably applied. The facts should be considered in deciding whether or not governmental "interests" involved should be protected. Summary judgment based on sovereign immunity results in no consideration of the real merits of protecting governmental interests—it is an oversimplified categorical rejection of the case without reasoning.

G. Sovereign Immunity in Judicial Review has been widely disapproved. Reform is strongly recommended.

> "A single, well considered opinion could do about all that is needed to straighten out the fundamental Law." K. Davis, *Administrative Law Text*, § 2707 (3rd Ed. 1972).

The Administrative Conference of the United States and the American Bar Association support the abolition of sovereign immunity in judicial review. See Littell v. Morton, *supra*, at 1214; Recommendation 9 of the Administrative Conference of the United States adopted October 21, 1969, 38 U.S.L.W. 2242 (1969).

Professor Cramton in his comprehensive study states:

> "No scholar, so far as can be ascertained, has had a good word for sovereign immunity for many years."

Among the authorities opposed to the doctrine, he lists Gellhorn, Jaffee, Byse, Carrow, and of course, Davis. He cites numerous recommendations for abolition and reform which have been proposed by this "unanimity of legal scholarship." (Cramton, *supra*, 68 Mich. L. Rev. at 419)

2. The Administrative Procedure Act Has Been Construed as a Waiver of Sovereign Immunity by Some Circuits, Creating a Conflict Among the Circuits.

Courts have held that the Administrative Procedure Act constitutes a waiver of sovereign immunity. These holdings have avoided the injustice of arbitrarily applied immunity, but in doing so have precipitated a sharply defined conflict among the Federal Circuits.

All sections of the A.P.A. indicate that judicial review is to be available to aggrieved parties. (5 U.S.C. § 701-706 (Appendix F).) In particular, section 10(a) of the A.P.A., 5 U.S.C. § 702, contains language reasonably constituting a statutory waiver in suits for nonstatutory review of administrative action. Commentators point out:

"The Supreme Court could eliminate the sovereign immunity problem in judicial review of Federal administrative action by a swift stroke of the pen. All that would be required is a holding

that § 10(a) of the Administrative Procedure Act *as amended*, 5 U.S.C.A. § 702 (Supp. IV 1965-1968), means what it says: 'A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.'" *Cramton, supra*, 68 *Mich. L. Rev.* at 417-418, n. 143 (1970).

"The logic of this argument is persuasive; an elaborate system created by Congress to provide judicial review of federal administrative action is, by its very nature, inconsistent with a doctrine that denied such review absent Congressional consent to suit." Note, *Nonstatutory Review of Federal Agency Action: A New Approach to Sovereign Immunity*, 24 Me. L. Rev. 123, 130 (1972).

Two circuits have held that this section of the A.P.A. constitutes a waiver of the sovereign immunity defense. Scanwell Laboratories, Inc. v. Shaffer, 424 F. 2d 873 (D.C. Cir. 1970); Kletschka v. Driver, 411 F.2d 436 (2nd Cir. 1969).

Two other Circuits at one time held that it did but have now modified their positions. Adams v. Witmer, 271 F. 2d 29 (9th Cir. 1958) and the later case Washington v. Udall, 417 F. 2d 1310 (9th Cir. 1969); Estrada v. Ahrens, 296 F.2d 690 (5th Cir. 1961) and the later case Colson v. Hickel, 428 F.2d 1046 *cert. denied* (5th Cir. 1970).

Five of the Circuits have held that the A.P.A. does not constitute a waiver of the immunity. Motah v. United States, 402 F.2d 1 (10th Cir. 1968); Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529 (8th Cir. 1967); Cyrus v. United States, 226 F.2d 416 (1st Cir. 1955); Zimmerman v. United States Government, 422 F.2d 326 (3rd Cir. 1970); Railway Express Agency, Inc. v. Kennedy, 189 F.2d 801 (7th Cir. 1951).

The position of the 4th Circuit is undecided, because in *Littell v. Morton, supra*, that court formulated a revised con-

cept of the doctrine. The *Littell* discussion of the confused state of the law is in point concerning the effect of the Administrative Procedure Act:

> "Our task is magnified because we have been unable to find any case in which the Supreme Court has sought to reconcile the notion of sovereign immunity with the fundamental concept of the A.P.A. that a person adversely affected by administrative action is presumptively entitled to judicial review of its correctness." 445 F.2d at 1212.

The Administrative Procedure Act does not mention sovereign immunity, most probably because the draftsmen believed that the law was clear that immunity would not apply to nonstatutory review. Final Report of the Attorney General's Committee on Administrative Procedure, Sen.Doc. No. 8, 77 Cong. 1st Sess. at 80, 81 (1941).

Recognition that the Administrative Procedure Act constitutes an expression of the intent that sovereign immunity does not apply to nonstatutory review would resolve this case and achieve rationality in this presently confused area of the law. A holding that the Act constitutes a waiver would avoid the underlying issues of sovereign immunity, and the waiver would control.

3. The Government Officer's Individual Privilege Should Be Based on Examination of the Facts of the Case.

This case also includes a claim against General Desobry personally for damages. Petitioner recognizes that the interests of government appear to require that officers be shielded to some extent from personal liability for their unauthorized acts. Barr v. Mateo, 360 U.S. 564 (1961). On the other hand, this protection is limited. Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388 (1971). In order to decide whether a particular act is within the scope of the government officer's

privilege, the court must have facts concerning the officer's position, the governmental interests involved, and the nature of the officer's actions. The remand of the *Bivens* case illustrates further the need for an inquiry into the facts. 456 F.2d 1339 (2nd Cir. 1972). Such inquiry was not made in Petitioner's case, thus summary judgment was improper.

The law has not yet reached the point where general principles can be formulated to describe the boundaries of the government officer's privilege. Most probably a gradual case-by-case development is to take place. In any event, *Bivens* has made it clear that such cases are to be decided on facts and not merely dismissed because of the "khaki curtain" involvement of an Army general. In seeking remand of this case for a decision on the facts, petitioner believes that the law expressed in *Bivens* can be reinforced so that other plaintiffs as well as petitioner will be judged on the facts and the merits, and not erroneously or summarily barred.

CONCLUSION

Plaintiff seeks his day in court. His Constitutional and administrative rights although violated have not been conceded in any court. The conflict and injustice that occurs when non-statutory review collides with sovereign immunity needs correction, so that citizens will be governed by law that is reasoned and just. For these reasons a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

JON E. RICKERT
122 North Main Street
Elizabethtown, Kentucky 42701
Phone 502/769-3344
Counsel for Petitioner

APPENDIX A

No. 73-1391

United States Court of Appeals for the Sixth Circuit

Fred Bramblett,
Plaintiff-Appellant,
v.
William R. Desobry, et al.,
Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Kentucky.

Decided and Filed January 8, 1974

Before: McCree and Miller, Circuit Judges, and Krupansky,* District Judge.

Per Curiam. This is an appeal from summary judgment for defendants in an action by Fred Bramblett against William R. Desobry, Commanding General of Fort Knox, and Robert F. Froehlke, Secretary of the Army. The amended complaint alleged that General Desobry acted in an arbitrary, capricious, and unconstitutional manner in dismissing Bramblett on September 3, 1971 from his position as manager of the Fort Knox Rod and Gun Club, a nonappropriated fund activity. Bramblett sought reinstatement, injunctive relief, damages, and a declaratory judgment.

On January 19, 1973, appellees moved to dismiss the action and the court ordered the motion to be treated as one for summary judgment. On February 27, 1973, summary judgment

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* The Honorable Robert B. Krupansky, United States District Judge for the Northern District of Ohio, sitting by designation.

was granted for the appellees on the grounds that the court lacked subject matter jurisdiction because of sovereign immunity. Bramblett appeals from that order.

A nonappropriated fund activity is initially created by government loans which are repaid out of profits earned by the activity. Such activities "are arms of the Government deemed by it essential for the performance of governmental functions . . . and partake of whatever immunities it may have under the Constitution and federal statutes." **Standard Oil Co. v. Johnson,** 316 U.S. 481, 485 (1941). The Fort Knox Rod and Gun Club, a nonappropriated fund activity, is an instrumentality of the United States and is, accordingly, entitled to claim sovereign immunity in actions brought against it.

The mere fact that appellant named only individuals as defendants does not preclude the defense of sovereign immunity. "The general rule is that a suit is against the sovereign if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting or to compel it to act." **Dugan v. Rank,** 372 U.S. 609, 620 (1963); **Land v. Dollar,** 330 U.S. 731 (1947); **Larson v. Domestic and Foreign Corp.,** 337 U.S. 682 (1949). **See also Hawaii v. Gordon,** 373 U.S. 57 (1963).

Government officials are personally immune from damage suits so long as they are acting within the scope of their duty, despite the effects of their actions. **Spalding v. Vilas,** 161 U.S. 483 (1895). There is an absolute privilege regardless of whether the appellee's decision was made in an arbitrary and capricious manner as appellant alleges. In a case involving libel by a government officer, the United States Supreme Court held, "[t]he fact that the action here taken was within the outer perimeter of petitioner's line of duty is enough to render the privilege applicable, despite allegations of malice in the complaint." **Barr v. Mateo,** 360 U.S. 564, 575 (1959). Here, the

fact that General Desobry, as Commanding General of Fort Knox, had the power to fire appellant renders irrelevant the contentions that he abused his discretion and acted outside his authority. The general's exercise of his power to dismiss employees is immune from personal damage suits.

Appellant's contention that the Administrative Procedure Act (5 U.S.C. § 701 *et seq.*) confers jurisdiction upon the United States District Courts to review an abuse of discretion is also unfounded. "The United States as sovereign is immune from suit save as it consents to be sued, and the terms of its consent to be sued in any court define that court's jurisdiction to entertain the suit." **U.S. v. Sherwood**, 312 U.S. 584, 586 (1941); **Hawaii v. Gordon,** *supra*. The APA does not confer jurisdiction on the courts. **Yahr v. Resor,** 339 F. Supp. 964 (D.N.C. 1972); **Ove Gustavsson Contracting Co. v. Floete,** 278 F.2d 912 (2d Cir. 1960). "In any case wherein the immunity doctrine is so transcending as to require dismissal of the suit, the Act (APA) does not provide for judicial review." **Washington v. Udall,** 417 F.2d 1310, 1320 (9th Cir. 1969); **Littel v. Morton,** 445 F.2d 1207 (4th Cir. 1971). We think this is such a case.

There has been no waiver of sovereign immunity for a nonappropriated fund activity such as the Fort Knox Rod and Gun Club. Although 28 U.S.C. § 1346(a), enacted as an amendment to the Tucker Act in 1970, expressly allows suits based on contracts with post exchanges, Congress deliberately withheld waiver of sovereign immunity for all other types of nonappropriated fund activities. **Swift-Train v. U.S.,** 443 F.2d 1140 (5th Cir. 1971). Sovereign immunity likewise barred a mandamus action against a nonappropriated fund activity in **Bowen v. Culotta,** 294 F. Supp. 183 (D. Va. 1968), where an employee sought reinstatement after being fired by her superior.

Appellant's suit is barred by the doctrine of sovereign immunity. The order of the district court granting appellees' motion for summary judgment is therefore affirmed.

APPENDIX B

United States District Court for the
Western District of Kentucky
At Louisville

Fred Bramblett, Plaintiff, vs. William R. Desobry and Robert F. Froehlke, Defendants.	Civil Action. No. 7333-A.

Memorandum Opinion

This case is before the Court on the Defendants' Motion to Dismiss, which, by Order of this Court on January 19, 1973, is being treated as a motion for summary judgment. The point at issue in this case has evolved from a demand for the production of certain information to a claim for damages and injunctive relief. It is the position of the Defendants that this Court lacks jurisdiction over the subject matter of this action, under the doctrine of sovereign immunity.

In May, 1971, the Defendant, Desobry, commanding general at Fort Knox, Kentucky, ordered the suspension of the Plaintiff from regular employment as manager of the Fort Knox Rod and Gun Club, a non-appropriated fund activity, on the grounds of inefficiency and mismanagement. Various investigations, a hearing before an examiner, and submission to a semi-secret board of review all took place before the final decision of the Plaintiff's removal was made in June, 1972. In the interim period, there was some controversy over the production

of certain documents by the Defendants, but that dispute is at rest now because all such documents and information have been made available to the Plaintiff. The Rod and Gun Club, as a non-appropriated fund activity, is an instrumentality of the United States. In making the decision to suspend and then to remove the Plaintiff, the Defendant, Desobry, was acting in his official capacity as commanding general of Fort Knox.

In his Complaint and Amended Complaint, the Plaintiff raises numerous questions of procedural due process, denial of right of appeal, and discrimination. He has claimed that the decision to remove him was made in an arbitrary and capricious fashion. However, the Court feels that, in view of the situation, the only issue which requires attention is whether or not this Court has jurisdiction to hear this case.

The Court believes that the doctrine of sovereign immunity precludes it from hearing this case for two reasons. First, it does not appear that the United States has ever consented to suits against it involving non-appropriated fund activities. Secondly, all of the actions taken by the Defendant, Desobry, regarding the Plaintiff were done within the scope of his official responsibilities.

It has long been well established that a non-appropriated fund activity is an instrumentality of the United States and entitled to all immunities thereof. **Standard Oil of California v. Johnson,** 316 U.S. 481. It is not herein contended that the Fort Knox Rod and Gun Club is other than a non-appropriated fund activity. The Court believes that the Plaintiff is in error in his belief that the Standard Oil case is limited to the specific factual situation therein involved. There is no indication to that effect in the opinion. The Supreme Court ruled that a non-appropriated fund activity shares in fulfilling the duties entrusted to it and partakes of whatever immunities it may have under the Constitution and federal statutes. See also **Swift-Train Co. v.**

United States, 443 F.2d 1140 (C.A. 5, 1971); **Bowen v. Culotta,** 294 F. Supp. 183 (E.D. Va., 1968).

As an instrumentality of the United States, a non-appropriated fund activity can be the subject of a lawsuit only when and if the United States consents. Simply stated, the Court does not find that the United States has ever given its consent to suits like the present one. 28 U.S.C. § 1346 comes closest of any statute to addressing this issue, and it gives consent to suits on contracts against post exchanges on military bases. There is no indication of an intention by Congress to extend consent to other non-appropriated fund activities. Indeed, the legislative history of 28 U.S.C. § 1346, as amended, indicates that only suits by independent contractors against post exchanges for services and materials were under consideration. Suits by employees for wages were never considered. The Court repeats that it has found no other statutory authority which gives consent to a suit like the present one. The Court does not believe that the consent of the sovereign to be sued can ever be implied. If such consent is not explicit, it does not exist. In the current case, it just does not exist. See **Hawaii v. Gordon,** 373 U.S. 57 (1963); **Jaeger v. United States,** 394 F.2d 944 (C.A. D.C., 1968); **Bowen v. Culotta,** *supra.*

Aside from the issue of the lack of the sovereign's consent to be sued, the doctrine of immunity would apply in this case anyway because the Defendant, Desobry, was acting within the scope of his official responsibilities as commander of Fort Knox when he ordered the removal of the Plaintiff. The Plaintiff does not contend that the Defendant, Desobry, was not the proper authority to make the decision to remove him; he only contends that an unfair and erroneous decision was made. The leading case on this topic is **Barr v. Matteo,** 360 U.S. 564 (1959), which, although it was a slander-libel case, set down the rule on the immunity of government officers from suit. The Supreme Court held:

> It has been thought important that officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties . . .

This rule has been extended to specifically include military officers sued in their official capacity within the shield of sovereign immunity. **Harris v. United States,** 204 F. Supp. 288 (D.C. Mass., 1962), **affirmed** 308 F.2d 573.

The Court notes that employees of non-appropriated fund activities are specifically exempted from the relevant provisions of the Administrative Procedure Act, 5 U.S.C. § 2105(c). The Plaintiff's reliance on that Act, therefore, is misplaced.

The Court further notes that Army Regulations 230-2, effective January 1, 1972 (and, therefore, too late to affect the Plaintiff herein), will to some degree, at least, provide appeals for persons in situations similar to the Plaintiff.

It is, of course, obvious that all that has been said above in relation to the Defendant, Desobry, applies as well to the Defendant, Froehlke, who, in any event, was not mentioned in the Plaintiff's allegations.

On the grounds that this Court lacks jurisdiction in this case because of the immunity of the sovereign, the Court has this day entered an Order granting the Defendants' Motion for Summary Judgment.

February 26, 1973.

/s/ Charles M. Allen
United States District Judge

Copies to:

Counsel of record.

(Entered Feb. 27, 1973)

APPENDIX C

Department of the Army
Headquarters US Army Armor Center and Fort Knox
Fort Knox, Kentucky 40121

AHBADPCA-CP 1 June 1972

Subject: Final Decision on Appeals from Suspension and Removal

Mr. Fred Bramblett
Route 6
Elizabethtown, Kentucky 42701

1. This is to notify you of the final decision in response to your letters dated 11 August 1971 and 15 September 1971, in which you requested a review and hearing under the appeal procedures of this Headquarters.

2. A careful study has been made of all records pertaining to the adverse personnel actions appealed, i.e., (a) your suspension from duty without pay from 30 July 1971 through 29 August 1971 from your position as Manager of the Fort Knox Rod and Gun Club, a nonappropriated fund activity, and (b) your removal from such employment effective 6 September 1971.

a. This study revealed that responsible and authorized officials complied with all procedural and regulatory requirements applicable to nonappropriate fund (NAF) employees in processing these personnel actions. The procedures followed were reasonable and provided ample opportunity for reply (including reply to the clarified and supplemental charges dated 16 August 1971) and for fair and equitable decisions. Your request for

adherence to various inapplicable Civil Service and Civilian Personnel regulations was properly denied; the cited regulations had not been adopted for application to NAF employees by higher headquarters and it was not feasible or reasonable to do so locally.

b. The reasons for the personnel actions were specificially described with detailed supporting information in the form of specific charges. Material relied upon to support the charges was also made available. Your contention that the reasons were vague is not substantiated by the record.

c. The administrative appeal and hearing procedures, established by this Headquarters as a local installation policy for all NAF employees on 5 February 1971, were followed to the fullest. The lengthy hearing insured that your point of view received full and objective consideration and that relevant facts and circumstances were developed to enable an equitable and responsive final decision.

d. The reasons for the suspension were cited in letters to you dated 28 July 1971 and 17 August 1971. The reasons are supported by substantiated evidence in the record and are found to warrant the suspension.

e. The reasons and specified charges which formed the basis for the removal decision were cited in letter to you dated 3 September 1971. The charges were amended by withdrawal during the hearing of stipulated portions of four charges, numbered in your summation as 4 (specified items of inventory), 10 (Part 4 regarding firearms license revocation), 10a (the first part regarding cash sales not rung up on the cash register), and 16 (the candy commission portion). With the exception of charge 12, all of the remaining charges are found to be supported by the evidence of record, and, in view of this I can only conclude that the removal action taken against you was justified.

(1) Your contentions that the penalty is excessive and that each of the charges be considered a first offense under Table 7-1 of AR 230-2 are inconsistent with the intended use of the table for individual offenses, the nature and number of charges, the responsibilities of the position, and the fact that the charges are supportive to the basic reasons of "continued inefficiency, violation of regulatory requirements whereby the safety of funds and property were endangered, and application of improper business practices." Each individual charge, standing alone, might not warrant, removal or suspension. Taken together, however, they provide reasonable cause to conclude that removal is warranted to promote the efficiency of the operation.

(2) Your references to continued Club practices and financial success after your removal are immaterial to the issues in question.

(3) Your references to the previous longevity salary increase and promotion by job reclassification do not mitigate the deserved severity of the appealed personnel actions. Had the facts been known at the time, the salary increase and promotion would not have been approved.

(4) There is no evidence that the appealed personnel actions were arbitrary, capricious, unreasonable, or an abuse of management discretion.

(5) The position responsibilities included independent accomplishment of managerial business affairs in a responsible and efficient manner, compliance with regulatory and procedural requirements, and the safe-guarding of property and funds. The sustained charges reflect a series of unacceptable failures to properly and adequately carry out these responsibilities. Your removal was therefore warranted to promote the efficiency of the NAF activity concerned.

3. In view of the voluminous record, I appointed an impartial board of officers to make a detailed independent review of the

hearing transcript and exhibits. The Board recommended that management's decisions be sustained.

4. For the above reasons, my decision is that the remedial action you request is denied and the suspension and removal are sustained. This decision is final and you are not entitled to further review of this matter within the Department of the Army.

/s/ William R. Desobry
Major General, USA
Commanding

CF:

Mr. Jon E. Rickert, Attorney at Law

APPENDIX D

8 March 1972

Subject: Report of Inquiry on the Appeal of Mr. Fred Bramblett, Fort Knox, Ketucky.

Part VI—Summary.

1. Testimony and evidence produced during the hearing indicates that at the time of the alleged charges there was not a well defined SOP; that instructions were fragmentary and allowed a wide latitude of interpretation and implementation at the Club Manager's discretion.

2. The notices of proposed action did not sufficiently identify what Mr. Bramblett was charged with (what, when, where, why and how) in the majority of the charges for the examiner to determine whether or not the evidence presented or the testimony given even pertained to the same offense he was supposedly being charged with.

3. Testimony and evidence presented indicated that the investigation may have been initiated by a statement made to the CID by an employee, Thomas Hansbrough (see page 50, Session Number 1, testimony of Major Campbell).

4. Testimony by two witnesses Bob Davidson (see page 7, tape number 2, Session Number 13) and Sergeant Haywood (Appellant's Exhibit Number 12) indicates that Mr. Hansbrough had threatened to "get even" with Mr. Bramblett.

5. Official records do not substantiate the charge of continued inefficiency inasmuch as there was no record of previous offenses in Mr. Bramblett's personnel file.

6. Mr. Kenneth A. Wietstock, Chief, CPO NAF Branch, testified that he personally informed Mr. Bramblett in the presence of Mr. Rickert, on or about 20 August 1971, that he felt the charges should be dropped for lack of evidence (see page number 10, Session Number 13).

Part VII—Findings and Recommendations.

1. As the record shows, the offenses committed by Mr. Bramblett were minor and no previous disciplinary action had been taken for alleged offenses dating back to 1969. Colonel Leo J. Nawn, Mr. Bramblett's immediate supervisor at the time disciplinary action was taken stated for the record (Appellant's Exhibit Number 9) that during his tenure of office (May 1970 to May 1971) Mr. Bramblett did an outstanding job as Manager of the club; financial records will reflect that the overall annual operations were successful; that he was loyal, faithful, trustworthy and courteous to all. Considering the appellant's case in the light of the foregoing, the examiner can only conclude that a removal action was unjustified in his case. This finding takes into consideration the examiner's belief that in view of all the circumstances surrounding the committed offenses, the penalty imposed will not improve the efficiency of the service.

2. Recommend that Mr. Fred Bramblett be restored to his position retroactive to the effective date of his removal, 6 September 1971, that the 30-day suspension prior to and connected with the removal be cancelled, and that he be fully remunerated for all loss of pay and allowances due to these actions.

/s/ Jonny M. Holloway
Appeals Examiner

5 Incl
as

APPENDIX E

Affidavit

1. I, William R. Desobry, being under oath, do hereby state that I am the Commander, U. S. Army Armor Center and Fort Knox, Fort Knox, Kentucky, and that I have held this position since 1 April 1971.

2. The purpose of this affidavit is to clarify for the court certain of the actions taken by this headquarters concerning the removal of Mr. Fred Bramblett from his position as manager of the Fort Knox Rod and Gun Club.

3. First, I would like to explain clearly my personal activities concerning Mr. Bramblett's removal. All of the personnel actions concerning Mr. Bramblett, from the initial notification on 14 May 1971 of leave without pay to the decision on 3 September 1971 to remove him, were accomplished by the Nonappropriated Fund Branch, Personnel Services Division, Directorate of Personnel and Community Activities, the staff section having supervisory responsibility over the Rod and Gun Club's activities, with assistance from the Nonappropriated Fund Personnel Branch of the Civilian Personnel Office. Naturally, I was generally aware of the proceedings; I have a regulatory duty under paragraph 1-8a, Army Regulation 210-10 (Incl 1), and paragraph 1-4c, Army Regulation 230-2 (Incl 2), to be so informed. However, my interest in the case was purely informational until after the record of the case was forwarded to me for final decision upon Mr. Bramblett's appeal. Prior to receiving the record for final decision, I had neither formed a personal opinion concerning the case nor attempted to influence my subordinates in their actions concerning it.

4. a. In a normal case, before being forwarded to me for final decision, the appeal examiner's findings and the verbatim

record of the appeal hearing would have been evaluated by the members of my staff whose areas of expertise the removal action involved. This procedure would have been consistent with Army guidelines for staff procedure as outlined in paragraphs 1-7 and 2-3, Field Manual 101-5 (Incls 3 and 4). However, in this case, I felt that the record was too massive and complex to permit normal staffing without adversely affecting other essential missions of this command. Therefore, I ordered the appointment of a special board of officers to review the record and to make recommendations to me as to appropriate action in the case. The board was not intended to be, nor was it, an adversary investigative proceeding. Neither management nor Mr. Bramblett appeared before it. The board considered only the record as it already existed; no new evidence was added, no new witnesses were called. The authority for the board was cited in the appointing order as Army Regulation 15-6 (32 C.F.R. 519) only because that regulation serves as a general procedural guide for all boards of officers not appointed under a specific regulation. Since the board was in essence performing a staff review rather than an original investigation, it was my opinion that neither party to the removal proceedings required notification, representation, or any of the other procedural rights outlined in Army Regulation 15-6.

b. There was no effort made to conceal the existence of this board. Orders appointing the board were published and distributed in the normal manner. On the other hand, as I stated above, in light of the fact that the board was merely substituting for normal staff review, neither of the parties were notified or present at the board hearing. Also, after the board had completed its assigned task, its recommendations constituted an internal communication providing advice for my final decision. As such, under paragraph 10e(1), Army Regulation 345-20 [32 C.F.R. 518.10(e)(1)], they were not releasable to the public.

c. In reaching my final decision in this matter, I considered neither the appeal examiner's findings nor the 15-6 board's recommendations as binding upon me. After consideration of both of these, as well as further recommendations by my staff members, I personally made the final decision to uphold the removal of Mr. Bramblett.

5. The next matter for explanation is the actions taken by this headquarters on the requests by Mr. Bramblett's attorney, Mr. Rickert, for information pertaining to this case contained in files at this headquarters. The first two requests, on 3 April and 1 May 1972 (Exhibits A and C to the original complaint), were considered in the context of, and tied to, Mr. Rickert's contention after the appeal hearing that he had a right to further participation in the decision-making process in this case. Mr. Rickert's position appeared to be that he required this information because he was entitled to rebuttal if I, or a higher Army appellate body, determined that the appeal examiner's findings should be overruled. The opinion of this headquarters was that his interpretation was incorrect in that I was the final decision-maker and the appeal examiner's findings were not binding upon me. Therefore, the responses to Mr. Rickert's letters of 3 April and 1 May treated the requests for information as ancillary matters to the procedural objections he had raised rather than as formal requests for release under Army Regulation 345-20 and the Freedom of Information Act. In contrast, Mr. Rickert's letter of 27 June 1972 (Exhibit G to the original complaint) was unequivocally such a formal request and was treated as such. This letter was referred to my Staff Judge Advocate under paragraph 7a, Army Regulation 345-20, for a legal determination as to what information was releasable. His study of the problem, with a proposed reply for the Deputy Installation Commander's signature, was completed and forwarded on 20 July 1972, which was four days before Mr. Bramblett filed his original complaint and five days before this headquarters was served with that complaint. Due to normal processing of

this study through my subordinates, though, it did not reach me until 26 July, at which time, of course, I did have knowledge of the suit. However, as I normally would in a matter like this involving strictly a legal issue, I deferred, without exception, to the advice of my Staff Judge Advocate. Thus, the letter which the Deputy Installation Commander dispatched to Mr. Rickert on 26 July 1972 (Incl 5) had, in fact, been prepared without knowledge of Mr. Bramblett's original complaint.

6. Finally, all of my activities in this case were accomplished in my official capacity as Commander, U.S. Army Armor Center and Fort Knox.

/s/ William R. Desobry
Major General, U.S. Army
Commanding

Subscribed and sworn to before me, a person authorized under 10 U.S.C. 936 to administer oaths, this 22d day of November 1972 at Fort Knox, Kentucky.

/s/ James E. Macklin, Jr.
Colonel, JAGC
Staff Judge Advocate

APPENDIX F

The statutes which pertain to judicial review of administrative action in the district courts provide as follows:

28 U.S.C. § 1331. Federal question; amount in controversy; costs

> "(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States."

28 U.S.C. § 1361 Action to compel an officer of the United States to perform his duty

> "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff."

28 U.S.C. § 2201 Declaratory Judgments. Creation of remedy.

> "In case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. § 2202 Declaratory Judgments. Further relief.

> "Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

Rule 25(d) of the Federal Rules of Civil Procedure, pertaining to suits against public officers, provides as follows:

> "(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomes not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.
>
> (2) When a public officer sues or is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added."

Administrative Procedure Act—pertinent provisions show intent to make review available without bar of sovereign immunity:

5 U.S.C. § 701. Application; definitions

> "(a) This chapter applies, according to the provisions thereof, except to the extent that—
>
> (1) statutes preclude judicial review; or
>
> (2) agency action is committed to agency discretion by law."

5 U.S.C. § 702. Right of review

> "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

5 U.S.C. § 703. Form and venue of proceeding

"The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs or prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement."

5 U.S.C. § 704. Actions reviewable

"Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review . . ."

5 U.S.C. § 706. Scope of review

"To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to section 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial *de novo* by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error."

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1501

FRED BRAMBLETT, PETITIONER

v.

WILLIAM R. DESOBRY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petititioner contends that the doctrines of sovereign immunity and official privilege should not have been invoked to bar his action for reinstatement and damages.

Petitioner was the manager of the Fort Knox Rod and Gun Club, a non-appropriated fund activity of the federal government. He was removed by General Desobry, Commanding General of Fort Knox, for alleged mismanagement of the Club. He appealed and was given a hearing before an "Appeals Examiner," who found the removal to be an excessive penalty and recommended that petitioner be restored to his post (Pet. App. A-13). General Desobry, upon receiving the Appeals Examiner's recommendation, convened a staff committee to review the transcript and recommend action. Subsequently, General Desobry discharged petitioner (Pet. App. A-14--A-15).

Petitioner then sued to compel disclosure of the findings of the Appeals Examiner and the report of the staff committee. The findings of the Appeals Examiner were

disclosed to petitioner, who then also sought reinstatement, back pay, and damages for the allegedly arbitrary and capricious action resulting in his discharge. The district court, treating the defendant's motion to dismiss as a motion for summary judgment, allowed both sides to submit additional material, and then granted the motion. It held that it lacked jurisdiction to hear the case because the United States had not waived its sovereign immunity to suits arising out of non-appropriated fund activities, and that General Desobry was immune from suit for damages for actions taken in his official capacity. The court of appeals affirmed (Pet. App. A).

1. Non-appropriated fund activities, such as post exchanges and the Rod and Gun Club here, "are arms of the Government deemed by it essential for the performance of governmental functions * * * and partake of whatever immunities it may have under the Constitution and federal statutes." *Standard Oil Co.* v. *Johnson,* 316 U.S. 481, 485. The fact that only individuals were named as defendants does not defeat the government's defense of sovereign immunity. "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' * * * or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.' " *Dugan* v. *Rank,* 372 U.S. 609, 620. See, also, *Larson* v. *Domestic and Foreign Corp.,* 337 U.S. 682; *Hawaii* v. *Gordon,* 373 U.S. 57. Moreover, government officials are personally immune from suit if they are acting within the "outer perimeter of [their] line of duty." *Barr* v. *Matteo,* 360 U.S. 564, 575. Accordingly, the court of appeals correctly affirmed the grant of summary judgment for the government.

2. Although there appears to be a conflict among the circuits as to whether the Administrative Procedure Act constitutes a waiver of sovereign immunity in certain contexts, there is no conflict on the sovereign immunity issues as they are raised by this case. This case is essentially a suit for back pay and damages, as the Fort Knox Rod and Gun Club has dissolved because of insolvency and reinstatement to the Club is no longer available as a remedy (see Amended Complaint, para. 9). No court has held that the APA constitutes a waiver of sovereign immunity in a suit for money damages. Rather, the cases which hold that the APA constitutes a waiver of sovereign immunity hold that it does so only as to cases coming within its scope. See *Kletschka* v. *Driver,* 411 F. 2d 436, 445 (C.A. 2); *Scanwell Laboratories, Inc.* v. *Shaffer,* 424 F. 2d 859, 873 (C.A.D.C.). Indeed, the Fifth Circuit has recently held, in *Warner* v. *Cox,* 487 F. 2d 1301, 1303, that a suit to review allegedly arbitrary and capricious agency action in failing to make payments allegedly due under a contract was not cognizable under the APA because the APA does not waive sovereign immunity to suits seeking money damages against the United States. The court stated (487 F. 2d at 1304-1305):

> Although some circuit courts, including this one, have seen in the APA a broad and general waiver of sovereign immunity in cases to which it applies, none has yet extended this to suits seeking money damages against the United States. See *Scanwell Laboratories, Inc.* v. *Shaffer,* 137 U.S. App. D.C. 371, 424 F. 2d 859 (1970); *Kletschka* v. *Driver,* 411 F. 2d 436 (2d Cir., 1969); *Estrada* v. *Ahrens,* 296 F. 2d 690 (5th Cir., 1961) [footnote omitted].

Had plaintiff succeeded in *Warner*, it would have obtained an injunction ordering the government to pay the amounts due under the contract; in other words, a money judgment.[1]

Moreover, the APA does not waive sovereign immunity where the "doctrine is so transcending as to require dismissal of the suit." *Washington* v. *Udall*, 417 F. 2d 1310, 1320 (C.A. 9). Certainly the same rule should apply when Congress has manifested its intention that immunity should apply, as it has here. In 1970, Congress amended the Tucker Act to allow suits on contracts made by post exchanges. 28 U.S.C. 1346(a)(2), as amended. No waiver of sovereign immunity was made for other non-appropriated fund activities. See S. Rep. No. 268, 91st Cong., 1st Sess., p. 16; *Swiff-Train* v. *United States*, 443 F. 2d 1140 (C.A. 5). The legislative history of the 1970 amendment indicates that Congress was concerned that non-appropriated fund activities, other than post exchanges, might not have sufficient assets to reimburse the United States should they be held liable. H. Rep. No. 993, 91st Cong., 1st Sess., p. 2. This legislative history, in the context of non-appropriated fund contract liability under the Tucker Act, reflects congressional reaffirmation of the principle of sovereign immunity where not specifically waived. It follows that waiver in these circumstances may not properly be inferred from the APA.

3. Finally, certiorari should be denied for the additional reason that there is no merit to petitioner's challenge to the administrative action. In an uncontradicted affidavit

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[1]Since petitioner's claim is now one for accured money damages alone, he cannot defeat the government's immunity by alleging that government officials exceeded their authority (see Pet. 12-14). Cf. *Edelman* v. *Jordan*, No. 72-1410, decided March 25, 1974. In any event, as shown *infra*, pp. 4-5, there is no basis for petitioner's challenge to the administrative action in this case.

(Exh. 4 to Defendant's Statement of Facts in Support of Motion to Dismiss) General Desobry stated that he convened a special board of officers to review the record in this case and to recommend to him appropriate action. He further stated that normally members of his staff would perform this function, but that the record was too large to permit such a procedure in this case without disrupting normal staffing. The board was thus merely performing a staff review function in aid of the dicision-making process. Cf. *Morgan* v. *United States,* 298 U.S. 468, 313 U.S. 409. Petitioner points to no other action allegedly denying him rights provided by statute or regulation.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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